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ABSTRACT

This document provides the public with a single document containing all regulatory provisions pertaining to the Family Educational Rights and Privacy Act. Included is a summary of the major comments received after publication of a notice of proposed rule-making. Each summary of comments is followed by a response that indicates whether or not a change has been made in the regulations. (Author/IRT)

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THURSDAY, JUNE 17, 1976

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PART II:

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Office of the Secretary

■

PRIVACY RIGHTS OF PARENTS AND STUDENTS

Final Rule on Education Records

EA 008 408

Title 45—Public Welfare

SUBTITLE A—DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, GENERAL ADMINISTRATION

PART 99—PRIVACY RIGHTS OF PARENTS AND STUDENTS

Final Rule on Education Records

Notice of proposed rulemaking was published in the FEDERAL REGISTER on January 6, 1975 at 40 FR 1208 setting forth the requirements to be met by an educational agency or institution to protect the privacy of parents and students under section 438 of the General Education Provisions Act, as amended (added by section 513 of Pub. L. 93-380 and amended by section 2 of Pub. L. 93-568).

Three hundred and twenty-one letters of comment were received during the 60-day public comment period which closed on March 7, 1975. All comments were given consideration during the revision of the regulations, the first segment of which was published in final form on March 2, 1976 at 41 FR 9026. This document supersedes the previously published final regulation. The revoked regulation has been incorporated for republication at subparts A (Sections 99.2 and .3), C (Sections 99.21-23), and D (Sections 99.31 and .36) of this document, in order to provide the public with a single document containing all regulatory provisions pertaining to the Family Educational Rights and Privacy Act.

While the Department unquestionably supports the purpose of the law—to provide greater privacy safeguards to parents and students through the application of fair information practice—during the course of developing this final regulation it became evident that translating this intent into practice might create a number of problems. For our part, there was a conscious effort to mitigate any dislocating effects which the regulation might have and, at the same time, remain consistent with the statute.

We believe that some working experience with this regulation will be helpful to the Department in determining whether there is a need to modify this regulation or whether a recommendation for legislative change may be either necessary or appropriate.

As a result, the regulation is being issued in final form, effective upon publication, with the commitment that comments on the regulation and its operation, including its effect on the day-to-day activities of educational agencies and institutions during the 1976-77 school year, will be formally invited for a ninety-day period commencing July 1, 1977. These comments will be used in evaluating this regulation and will be shared with the Congress, as may be necessary, in order to improve the effects and effectiveness of the regulation and the statute upon which it is based.

In addition to welcoming comments on the substance of these regulations, the Department will also solicit public comment regarding the most appropriate means of enforcing the provisions of the Act. Regarding the means of enforcement available to the Department, while educational agencies and institutions are accountable for Federal funds they receive and must act in conformity with Federal law, the practice of using the expenditure of Federal funds as leverage may not be the most effective way to accomplish the objectives of this statute. We would be interested in your views as to whether other more appropriate means of enforcement than institutional funds cutoff are or should be available.

ANALYSIS OF EARLIER COMMENTS

A summary of the major comments received follows in order of the sections numbered as in the final regulations. Each summary of comments is followed by a response which indicates whether or not a change has been made in the regulations. Technical changes, such as the renumbering of sections, are listed under other changes at the end of each section or subpart.

SUBPART A—GENERAL

1. Section 99.1 *Applicability of part.*

Comment. A commenter suggested that the determination as to whether or not an educational agency or institution would be required to comply with section 438 of the Act and this part should be based on the actual receipt of funds and not on whether funds have been made available under an applicable program.

Response. Sections 438 (a)(1)(A), (a)(2), (b)(1), and (b)(2) state that "No funds shall be made available under any applicable program to any educational agency or institution. * * *"; therefore, no change has been made in the regulations. However, the term "available" should be read in this context as referring to funds which have been obligated by the U.S. Commissioner of Education.

Comment. Several commenters indicated that it would be helpful to have a list of Federal programs administered by the U.S. Commissioner of Education. One commenter suggested that the list of programs be published as a part of the regulations.

Response. It was determined that it would not be feasible to publish a list of Federal programs administered by the Commissioner as a part of the regulations because any such list would be subject to change and tends to become out-of-date soon after it is published.

A list of programs administered by the Commissioner as of March 1975 was published at 40 FR 10503-5 (March 6, 1975) and is available as a reprint from the Superintendent of Documents, Government Printing Office, Washington, D.C. 20402.

Comment. Several commenters indicated they felt that if an educational agency or institution or students in attendance at the educational agency or institution received funds under any Federal program, the agency or institution should be required to comply with section 438 of the Act and this part.

Response. The statutory language limits coverage to educational agencies and institutions to which funds are made available under programs administered by the U.S. Commissioner of Education. Section 438 was an amendment to Part C of the General Education Provisions Act, as amended. Section 421 of Part C states that:

> The provisions of this part shall apply to any program for which the Commissioner has administrative responsibility, as specified by law or by delegation of authority pursuant to law.

In addition, the *Joint Statement in Explanation of Buckley/Pell Amendment* (*Congressional Record* at S. 21488, daily edition, December 13, 1974) stated in part:

> * * * by explicitly limiting the definition to those institutions participating in applicable programs, the amendment makes it clear that the Family Educational Rights and Privacy Act applies only to Office of Education programs and those programs delegated to the Commissioner of Education for administration * * * there has been some question as to whether the amendment's provisions should be applied to other HEW education-related programs such as Headstart or the educational research programs of the National Institute of Education. As rewritten, the limited nature of the Act's coverage should be clear.

Comment. A commenter asked if an educational agency or institution would be required to comply with Section 438 of the Act and this part if students in attendance at the agency or institution received funds under an applicable program administered by the Commissioner, such as the Basic Educational Opportunity Grant program, the Direct Student Loan program, or the Supplemental Educational Opportunity Grant program.

Response. Section 99.1, as revised, makes it clear that Section 438 applies to an agency or institution which either receives funds directly from the Office of Education, or which has students in attendance who receive funds from the Office of Education. For example, Section 438 would apply to an agency or institution which receives funds under the College Work-Study program, the Supplemental Opportunity Grants program, or the National Direct Student Loan program, or which has students who receive funds under the Basic Educational Opportunity Grant program or the guaranteed Student Loan program.

2. Section 99.3 *Definitions.*

Comment. Several commenters asked for clarification as to whether directory information included only the enumerated information, or if additional information could be designated as directory information.

Response. The definition of directory information has been modified to conform with the statutory definition; that is, that it "includes" the enumerated information. For guidance as to what further information could be included, the phrase "* * * and other similar information" has been added to the definition.

Comment. Several commenters recommended that the definition of education records be changed. The single suggestion most often made was that the term "school records" be used in place of "education records," and that school records

and non-school records be defined by their origin.

Response. Section 438(a)(4)(A) defines education records as "* * * those records, files, documents, and other materials which * * * contain information directly related to a student; and * * * are maintained by an educational agency or institution, or by a person acting for such agency or institution." Section 438(a)(4)(B)(i) through (iv) list those records which are not considered to be education records if conditions are adhered to by an educational agency or institution in the maintenance of the records. The statute does not provide for a differentiation between records maintained by an educational agency or institution based on the origin of those records.

Comment. Several commenters asked for clarification regarding what was meant by "institutional" in the definition of education records at section 438(a)(4)(B)(i).

Response. The word "institutional" appeared incorrectly in the copy of section 438 of the Act reprinted as a part of the proposed rules. The correct word was "instructional". The phrase at section 438(a)(4)(B)(i) should have stated "* * * records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto. * * *

Comment. Several commenters asked that the term "substitute" used in the definition of education records be defined.

Response. The term "substitute" in the definition of education records has been defined as "* * * an individual who performs on a temporary basis the duties of the individual who made the record, and does not refer to an individual who permanently succeeds the maker of the record in his or her position."

Comment. Several commenters asked for clarification as to what was meant by "same jurisdiction" in the definition of education records at section 438(a)(4)(B)(ii).

Response. Since the meaning may vary under applicable State law and factual situation, no attempt has been made to define by regulation the term "same jurisdiction."

Comment. Several commenters asked that the term "financial aid" be defined in the regulations.

Response. A definition of "financial aid" has been included. The definition states "a payment of funds provided to an individual (or a payment in kind of tangible or intangible property to the individual) which is conditioned on the individual's attendance at an educational agency or institution."

Comment. Several commenters asked for clarification regarding who could exercise parental rights and responsibilities on behalf of a student. Particular concern was expressed about whether a foster parent or other individual could act on behalf of a student.

Response. The definition of "parent" has been modified to include, in some instances, an individual who may not be the legal guardian of a student. The definition as revised states " 'Parent' includes a parent, a guardian, or an individual acting as a parent in the absence of a parent or guardian." An educational agency or institution may presume the parent has the authority to exercise the rights inherent in the Act unless the agency or institution has been provided with evidence that a State law, a court decree, or a legally binding instrument provides to the contrary.

Comment. A commenter suggested that an exception to the definition of "education records" be added for non-academic records kept by seminaries. The commenter indicated that seminaries and schools or departments of divinity or theology which are part of a college or university may maintain records on candidates for the priesthood or ministry, rabbinite, or religious orders. These records contain information on the spiritual and psychological development of such persons, and pertain to their suitability for the ministry, rabbinate or religious order, rather than to their educational performance. The commenter argued that the requirements of the Act should not apply to such records. Additionally, the commenter stated that the regulations should "exclude the application of the law when grants to the university comlex do not aid the seminary."

Response. As is made clear in the definitions of "education records", "student", and "educational agency or institution" contained in the Act, section 438 applies generally to all records directly relating to a student which are maintained by any part of an educational agency or institution which receives funds from programs for which the Commissioner has administrative responsibility. However, whether section 438 covers the type of record described by the commenter, or applies to the record-keeping policies of schools of divinity or theology which are part of an educational institution, may involve complex constitutional questions and interpretations of Supreme Court decisions. For this reason, such issues will be considered closely on a case-by-case basis as they arise, but will not at this time be addressed by regulation.

Comment. Several commenters asked if the definition of a student was intended to include or exclude certain individuals, such as former students.

Response. A new definition of student is provided which adopts much of the language used in section 438(a)(6). The definition states " 'Student' * * * includes any individual with respect to whom an educational agency or institution maintains education records."

Other Changes. A definition has been added for "disclosure." The terms "access" and "release" previously used to distinguish between disclosure to a parent or student and disclosure to a third party, respectively, generated confusion easily avoided by the use of the new single term to cover both situations.

The definition of "office and review board" has been deleted because the functions are explained under Subpart E—Enforcement.

The definition of "panel" has been modified in order to avoid any confusion between a panel and the review board. A panel is a subunit of the review board designated to conduct a hearing.

3. Section 99.4 *Student rights.*

Comment. Several commenters indicated they felt that parents had a right to receive information pertaining to their son or daughter, particularly grade reports, even if their son or daughter was eighteen years of age and attending an institution of postsecondary education, since in many cases the parents were paying for the postsecondary education of their son or daughter.

Response. Section 438(d) states that:

> * * * whenever a student has attained eighteen years of age, or is attending an institution of postsecondary education the permission or consent required of and the rights accorded to the parents of the students shall thereafter *only* be required of and accorded to the student. (Emphasis added.)

Since this is a right provided by statute no change has been made in the regulations. An institution of postsecondary education is permitted by section 438 of the Act and this part to disclose information pertaining to an eligible student to the parents of the eligible student with the prior written consent of the eligible student or without the prior written consent of the eligible student if that student is a dependent as defined under section 152 of the Internal Revenue Code of 1954.

Comment. Three commenters suggested that there was an apparent conflict between sections 99.4(a) and 99.30(h) of the proposed rules (99.30(h) has been renumbered section 99.31(a)(8)) and asked for clarification.

Response. A new section 99.4(b) has been added to provide clarification and section 99.4(b) of the proposed rules has been redesignated section 99.4(c). Section 99.31(a)(8) permits, but does not require, an institution of postsecondary education to disclose information contained in the education records of an eligible student to the parents of the eligible student if that eligible student is a dependent as defined under section 152 of the Internal Revenue Code of 1954. Section 99.4(b) states that the status of an eligible student as a dependent of his or her parents for purposes of section 99.31(a)(8) does not otherwise affect his or her rights under section 438 of the Act and this part.

4. Section 99.5 *Formulation of institutional policy and procedures.*

Comment. Several commenters indicated they felt that the notice requirement under section 99.5 of the proposed rules was too burdensome. The commenters, in most cases, did not object to the requirement that notice be provided to parents of students or eligible students, but they did object to the effect of the inclusion of certain items in the no-

tice under section 99.5(b) on the size of the document.

Response. The amount of information required to be given to parents of students and eligible students for annual notification purposes under section 99.5 of the proposed rules has been reduced. A new section 99.6 *Annual notification of rights* has been added to the regulations.

Comment. A commenter stated that a basic requirement of the regulations should be that each educational agency or institution adopt a policy which is consistent with the requirements of section 438 of the Act and this part. The commenter pointed out that sections 438 (a)(1)(A), (b)(1) and (b)(2) contain explicit references to an educational agency or institution being required to adopt policies, and that sections 438 (a)(2), (a)(5)(B), (b)(4)(A), and (e) contain implicit references to the need for an educational agency or institution to adopt policies.

Response. New section 99.5 *Formulation of Institutional policy and procedures* requires that each educational agency or institution formulate and adopt a policy consistent with the minimum requirements of section 438 of the Act and this part. The policy is to be in writing, and copies are to be made available upon request to parents of students or eligible students.

Comment. Several commenters indicated that the requirement under section 99.5(c) of the proposed rules that an educational agency or institution provide the required notification in the language of the parents of a student or an eligible student was, in many cases, inappropriate. Institutions of postsecondary education pointed out that since proficiency in the English language is a condition for admission to postsecondary institutions in the United States the requirement to provide notification to an eligible student in his or her language made little or no sense.

Response. The requirement in section 99.5(c) of the proposed rules has been modified. New section 99.6(b) requires that each agency or institution of elementary and secondary education, when developing a policy of informing parents of students of their rights, provide for the need to effectively notify parents identified as having a primary or home language other than English. The requirement that an institution of postsecondary education provide notification in the language of the eligible student has been deleted from the regulations.

Comment. Several commenters indicated they felt that the requirements in section 99.5(b) of the proposed rules were excessive. The commenters were particularly concerned about the requirement that an educational agency or institution publish the name of the official who has been designated as responsible for each type of education record. They pointed out that the name was likely to change because different individuals would be appointed over a period of time. The commenters also expressed concern about attempting to list the persons who would have access to education records. They stated that it would be difficult, in advance, to specify all of the individuals who might have a need for access to education records.

Response. The requirement in section 99.5(b) of the proposed rules regarding the official who has been designated by the educational agency or institution as responsible for each type of record has been modified. New section 99.5(a)(2)(iv) requires that the policy adopted by an educational agency or institution of informing parents of students or eligible students of the types of education records maintained by the agency or institution specify the title and address of the individual who has been designated as responsible for each type of record. The requirement to specify the name of the individual has been deleted from the regulations.

The requirement in section 99.5(b) of the proposed rules regarding the listing of persons who have access to education records has been deleted from the regulations. New section 99.5(a)(3) requires that the policy adopted by an educational agency or institution includes a specification of the criteria that the agency or institution will use for determining which parties are "school officials" and what is considered to be a "legitimate educational interest."

5. Section 99.6 *Annual notification of rights and policy.*

Comment. Several commenters asked for clarification regarding the means to be used by an educational agency or institution to provide the notification required by section 99.5(a) of the proposed rules. The specific question most often asked was whether notification must be provided on an individual basis to parents of students or to eligible students, or whether the notification could be published in a student handbook, school catalog, or student newspaper, or posted on bulletin boards at the school. Two commenters indicated that it was unclear as to whether notification was to be provided to former students as well as to students currently in attendance at an educational agency or institution.

Response. New section 99.6 states that the annual notification of rights and policy shall be "* * * by such means as are reasonably likely to inform parents or eligible students. * * *" The determination as to the actual means to be used is to made by each educational agency or institution. Some agencies and institutions may decide to provide notification on an individual basis; others may decide to publish the notification in a student handbook, school catalog, or student newspaper, or to post it on bulletin boards at the school. It was felt that the regulations should specify the criteria to be used in selecting a means of notification, but not the actual means of notification since the means may vary from agency to agency and institution to institution. In addition, new section 99.6 states that the notification is to be provided to parents of students in attendance or to eligible students in attendance at an educational agency or institution; therefore, making it clear that the notification of rights and policy need not be provided to former students or their parents.

Comment. Several commenters indicated they felt that the requirement for an educational agency or institution to provide notification on an annual basis was excessive. One commenter suggested that notification should be provided on a one-time basis at the time that a student enrolled in the educational agency or insitution.

Response. It was determined that the requirement for an educational agency or institution to provide notification on an annual basis was not excessive. Educational agencies and institutions generally issue or distribute student handbooks or school catalogs at the first of each school year. The notification could, in many instances, be a part of a handbook or catalog. Institutions of elementary and secondary education often send letters or distribute bulletins to parents of students at the start of each school year in order to inform them of the school's policies. The notification could, in these instances, be included in the letters or bulletins. It was felt that notification on a one-time basis at the time that a student enrolled in an educational agency or institution was not sufficient to inform parents of students or eligible students of their rights. No change has been made in the requirement.

Comment. Several commenters stated they felt that the requirement under section 99.5(b)(1) of the proposed rules to provide notification to parents of students or to eligible students as to the types of education records maintained by the educational agency or institution was excessive in that it was not specifically required by section 438 of the Act.

Response. New section 99.6(a) states that each educational agency shall provide notification to parents of students or eligible students which is reasonably likely to inform them of their rights under the Act and this part. As was previously stated in the comment section which followed section 99.5 of the proposed rules, it was determined that it was essential to require that each educational agency or institution identify the types of education records maintained by it, so that parents of students or eligible student would be able to decide which education records they wished to inspect and review. A similar, but less burdensome listing of the information required by section 99.5(b)(1) of the proposed rules is required under new section 99.5(a)(2)(iv) to be included in the policy and procedures of the educational agency or institution.

Comment. A commenter recommended that each educational agency or institution be required to inform parents of students or eligible students of the right to file a complaint with the Department of Health, Education, and Welfare concerning an alleged failure by the agency or

institution to comply with section 438 of the Act and this part.

Response. The right to file a complaint with the Department of Health, Education, and Welfare concerning an alleged failure by an educational agency or institution to comply with section 438 of the Act is one of the rights which parents of students or eligible students must be informed of under section 438(e).

6. Section 99.7 *Limitation on waivers.*

Comment. A commenter asked for clarification regarding whether or not an eligible student was permitted to waive the right to inspect and review information, other than confidential letters and statements of recommendation, contained in his or her education records.

Response. Section 438(a)(1)(C) states that "A student or person applying for admission may waive his right of access to confidential statements described in clause (iii) of subparagraph (B). * * *" The confidential recommendations described in section 438(a)(1)(B)(iii) are of three types "* * * respecting admission to any educational agency or institution * * * respecting an application for employment, and * * * respecting the receipt of an honor or honorary recognition." The *Joint Statement in Explanation of Buckley/Pell Amendment* (*Congressional Record*, at S. 21489, daily edition, December 13, 1974) states in part, "And students may waive their right of access to confidential recommendations in three areas—admissions, job placement, and receipt of awards." The statutory language, in light of the joint statement, would not preclude an eligible student from waiving his or her right to inspect and review; however, an educational agency or institution may not require that any right accorded by the Act be waived.

Comment. Several commenters asked if there was any limit on the period of time which a waiver could be considered to be in effect, and if a waiver provided by an eligible student could be revoked by that student at a later time.

Response. Nothing in section 438 of the Act, or this part sets any limit on the period of time that a waiver shall be considered to be in effect. An eligible student may waive his or her right to inspect and review a confidential letter or statement of recommendation provided by a specific individual, or confidential letters and statements of recommendation provided for a specific purpose. The waiver will be considered to be in effect as long as the letters or statements of recommendation are maintained in the education records of the student. If an eligible student waives his or her right to inspect and review a specific class of letters and statements of recommendation, such as recommendations respecting employment, and later decides to revoke that waiver, the student would be able to inspect only those letters and statements of recommendation respecting employment which were placed in his or her education records after the date that the waiver was revoked.

Comment. A commenter asked what would happen if an eligible student had waived his or her right to inspect and review confidential letters and statements of recommendation provided for a specific purpose if these letters and statements were subsequently used for a different purpose.

Response. Section 438(a)(1)(C) states that "* * * [a] waiver shall apply only if * * * such recommendations are used solely for the purpose for which they were specifically intended." If an eligible student has waived his or her right to inspect and review confidential letters and statements of recommendation provided for a specific purpose, and these letters and statements of recommendation are subsequently used for a different purpose, the waiver would be considered void, and the eligible student would have the right to inspect and review the letters and statements of recommendation.

Other Changes. Section 99.6 of the proposed rules has been renumbered section 99.7.

7. Section 99.8 *Fees.*

Comment. Several commenters asked if an educational agency or institution could charge a fee for copies of education records.

Response. New section 99.8 states that an educational agency or institution may charge a reasonable fee for copies of education records which are made for parents of students, students, or eligible students.

SUBPART B—INSPECTION AND REVIEW OF EDUCATION RECORDS

8. Section 99.11 *Right to inspect and review education records.*

Comment. A commenter suggested that language be added to section 99.11 stating that when parents are separated or divorced and one parent has been given custody of their child by agreement or a court order that both natural parents will have the right to inspect and review the education records of their child.

Response. Nothing in section 438 of the Act and this part is intended to effect the status of an agreement or court order under applicable State law regarding the custody of a child, or the exercise of rights on behalf of a child by separated or divorced parents. Paragraph (c) has been added to clarify this position.

Comment. A commenter recommended that the regulations state that an official of an educational agency or institution has a right to be present whenever the parent of a student or an eligible student inspects and reviews the education records of the student.

Response. The determination as to whether or not an official of the educational agency or institution will be present whenever the parent of a student or an eligible student inspects and reviews the education records of the student has been left up to each educational agency or institution. Nothing in section 438 of the Act or this part would preclude an educational agency or institution from adopting a policy which would require the presence of an official during the inspection and review of education records, if that policy would not operate to effectively prevent the exercise of rights by the parent or student.

Other Changes. New section 99.11 incorporates requirements from sections 99.13 and 99.15 of the proposed rules. The requirement that an educational agency or institution comply with a request to inspect and review education records within a reasonable period of time, but in no case more than forty-five days after the request has been made has been incorporated into section 99.11(a). Section 99.13 (c) and (d) of the proposed rules have been incorporated as sections 99.11(b) (1) and (2) of the regulations. This change was made in order to consolidate provisions pertaining to the right to inspect and review education records in one section.

9. Section 99.12 *Limitations on right to inspect and review education records.*

Comment. Several commenters objected to confidential letters and statements of recommendation which were placed in the education records of an eligible student before January 1, 1975 being exempted from inspection and review by the eligible student.

Response. Section 438(a)(1)(B) states that:

> The first sentence of subparagraph (A) shall not operate to make available to students in institutions of postsecondary education * * * confidential letters and statements of recommendation, which were placed in the education records prior to January 1, 1975. * * *

No change has been made in the regulations.

Comment. Several commenters objected to an eligible student being able to inspect and review letters and statements of recommendation which were placed in his or her education records after January 1, 1975. Two commenters felt that if letters and statements of recommendation were open to inspection and review by an eligible student it would be difficult for an individual who had been asked to write a recommendation to provide an honest assessment of the eligible student's abilities.

Response. Section 438(a)(1)(A) states that the parent of a student or an eligible student has the right to inspect and review the education records of the student. Section 438(a)(1)(C) permits an individual who is an applicant for admission to an agency or institution of postsecondary education or is a student in attendance at an agency or institution of postsecondary education to waive his or her right to inspect and review confidential recommendations respecting admission to an educational agency or institution, respecting an application for employment, and respecting the receipt of an honor or honorary recognition as long as certain conditions are met by the educational agency or institution including that:

> Such waivers may not be required as a condition for admission to, receipt of financial aid from, or receipt of any other services or benefits from such agency or institution.

No change has been made in the regulations. But additional waiver provisions were added.

Comment. Several commenters asked for clarification regarding whether or not an applicant for admission to an educational agency or institution has a right to inspect and review education records.

Response. The right to inspect and review education records is provided to the parent of a student or an eligible student. An applicant for admission to an educational agency or institution who is unsuccessful in his or her application may not be considered a student for purposes of section 438 of the Act or this part. The definition of student at section 438(a)(6) states in part: "* * * student * * * does not include a person who has not been in attendance at such agency or institution."

10. Section 99.13 *Limitation on destruction of education records.*

Comment. A commenter stated that an educational agency or institution should be permitted to destroy education records after a specified period of time.

Response. Generally, educational agencies and institutions are not precluded from destroying records unless there is an outstanding request to inspect and review them. The length of time which education records are required to be maintained by an educational agency or institution is, in many cases, determined under applicable State law or agency or institutional regulations. No change has been made in the regulations.

Comment. A commenter recommended that each educational agency or institution be required to provide notification to parents and eligible students 60 days in advance of the destruction of any education records.

Response. Nothing in section 438 of the Act and this part would preclude an educational agency or institution adopting a policy of providing notification to parents of students, and eligible students prior to the destruction of any education records. Such a requirement might work an undue burden on educational agencies or institutions which, though having a policy of destroying certain materials, purge records on a day-to-day basis rather than on a fixed schedule. No change has been made in the regulations.

Other Changes. Section 99.14 of the proposed rules has been renumbered section 99.13. Section 99.15 of the proposed rules has been deleted because it was redundant. Sections 99.13 (c) and (d) were redesignated sections 99.11 (b)(1) and (b)(2). The other paragraphs in section 99.13 have been deleted because they were redundant.

SUBPART C—AMENDMENT OF EDUCATIONAL RECORDS

11. Section 99.20 *Request to amend education records.*

Comment. Several commenters indicated they were concerned that an educational agency or institution might use the informal proceedings under section 99.21 of the proposed rules to delay in providing the parent of a student or an eligible student with an opportunity for a hearing to seek the correction of education records.

Response. Section 99.21 of the proposed rules has been deleted. New section 99.20 states that if a parent of a student or an eligible student believes that information in the education records of the student is inaccurate or misleading or violates the privacy or other rights of the student, the parent or the eligible student may request that the educational agency or institution amend the records. The educational agency or institution must decide whether to amend the education records within a reasonable period of time of receipt of the request. If the educational agency or institution decides to refuse to amend the education records of the student, the agency or institution must inform the parent of the student or the eligible student of the right to a hearing. If concerned that the educational agency or institution is utilizing informal attempts to reconcile differences as a delaying tactic, the parent or eligible student may exercise his right to a hearing without benefit of the decision from any informal proceeding.

12. Section 99.21 *Right to a hearing.*

Comment. A commenter suggested that the right to a hearing to seek the correction of information contained in the education records of a student be limited to permanent education records which are not more than three years old.

Response. The statute does not provide for such a time limitation. Section 438(a)(2) states that:

> the parents of students who are or have been in attendance at a school of such agency or such institution are provided an opportunity for a hearing * * * to challenge the content of such student's education records, in order to insure that the records are not inaccurate, misleading, or otherwise in violation of the privacy or other rights of students. * * *

In addition, the fact that the right is provided to parents of students "who * * * have been in attendance * * *" as well as to parents of students "who * * * are in attendance. * * *" makes it clear that the right to a hearing may not be denied because the education records are more than three years old. The purpose of the hearing is "to provide an opportunity for the correction or deletion of any such inaccurate, misleading or otherwise inappropriate data contained. * * *" in the education records of a student regardless of when the information was entered in the education records. No change has been made in the regulations.

Comment. A commenter recommended it be made explicit that when an educational agency or institution finds that information contained in the education records of a student is inaccurate, misleading, or otherwise inappropriate that the information must be corrected or deleted from the education records.

Response. New section 99.21(b) states that if, as a result of a hearing, an educational agency or institution decides that the information is inaccurate, misleading, or otherwise in violation of the rights of the student, the agency or institution shall amend the education records of the student accordingly, and so inform the parent of the student or the eligible student in writing.

Comment. A commenter requested clarification regarding whether or not a hearing could be requested by a parent of a student or an eligible student to contest the assignment of a grade.

Response. A hearing may not be requested by a parent of a student or an eligible student to contest the assignment of a grade; however, a hearing may be requested to contest whether or not the assigned grade was recorded accurately in the education records of the student. The *Joint Statement in Explanation of Buckley/Pell Amendment* (*Congressional Record* at S. 21488, daily edition, December 13, 1974) stated in part:

> There has been much concern that the right to a hearing will permit a parent or student to contest the grade given a student's performance in a course. That is not intended. It is intended only that there be procedures to challenge the accuracy of institutional records which record the grade which was actually given. Thus, the parents or student could seek to correct an improperly recorded grade, but could not through the hearing required pursuant to this law contest whether the teacher should have assigned a higher grade because the parents or student believe that the student was entitled to the higher grade.

Other Changes. Section 99.20 of the proposed rules has been renumbered section 99.21.

14. Section 99.22 *Conduct of the hearing.*

Comment. Several commenters expressed concern that the standards for the conduct of a hearing did not adequately satisfy due process requirements. The commenters recommended the inclusion of additional requirements to protect parents and students such as: (1) specifying the period of time within which educational agencies or institutions must hold a hearing, (2) requiring that the hearing be held at a time and place convenient for the parent or student, (3) permitting the parent or student to be assisted by an attorney or other representative of his or her choice, (4) providing the parent or student with an opportunity to present evidence relevant to the issues, (5) requiring that the hearing be conducted by an official who is not an employee of the school, agency, or institution, (6) requiring that the hearing be conducted and the decision be provided in the primary language of the parent or student, and (7) requiring that the decision be based solely on evidence presented at the hearing.

Response. New section 99.22 includes many, but not all of the recommended requirements. In some instances the recommended requirements have been modified. Section 99.22(a) states that the parent of a student or an eligible student shall be given notice of the date, place and time reasonably in advance of the hearing. An educational agency or institution must make a reasonable effort to schedule the hearing at a time and place which is convenient for the parent or eligible student and conduct

the hearing in a manner that will not effectively prevent the exercise of the parents' or students' rights.

Section 99.22(c) states that a parent of a student or an eligible student shall be afforded a full and fair opportunity to present evidence which is relevant to the issues, and that a parent or an eligible student may be assisted or represented by an individual of his or her choice at his or her own expense, including an attorney.

Section 99.22(e) states that the decision of an educational agency or institution shall be based solely upon the evidence presented at the hearing. In addition, the decision must include a summary of the evidence and the reasons for the decision.

It was determined that it was not feasible to set a specific period of time within which each educational agency or institution must hold a hearing. It was felt that the requirement under section 99.22(a) that a hearing be held within "* * * a reasonable period of time after the educational agency or institution has received the request * * *" when combined with the requirement under section 99.5(a)(3) that each educational agency or institution specify, as part of the policy it is required to formulate and adopt, the reasonable time limits under which it shall be obligated to act under the requirements of section 99.22(a) provides adequate protection to parents and students.

It was determined that the requirement that the hearing be conducted by an agency or institutional official or other party, who does not have a direct interest in the outcome of the hearing, provides adequate protection to parents and students. Nothing in section 438 of the Act or this part would preclude an educational agency or institution from employing a hearing examiner to conduct the hearing; however, the decision to abide with the determination of the hearing examiner must be the decision of the educational agency or institution.

It was determined that the requirement that an educational agency or institution conduct a hearing and provide the decision in the primary language of the parent or student would in many cases be burdensome. A parent or an eligible student has a right under section 99.22(c) to "* * * be assisted or represented by individuals of his or her choice at his or her own expense. * * *" If a parent of a student does not speak English, he or she could also be assisted by another individual who is qualified to serve as an interpreter. An educational agency or institution which serves students in an area where the primary or home language of the parents and students is a language other than English, is encouraged, but not required, whenever possible to conduct the hearing and provide the decision in the primary or home language of the parents and students.

Other Changes. Section 99.22 of the proposed rules entitled *Formal proceedings* has been retitled *Conduct of the hearing.*

SUBPART D—DISCLOSURE OF PERSONALLY IDENTIFIABLE INFORMATION FROM EDUCATIONAL RECORDS

15. Section 99.30 *When prior consent for disclosure required.*

Comment. Several commenters objected to the requirement that the names of the parties to whom information from the education records of a student is to be disclosed must be included as a part of the written consent.

Response. The requirement to include the names of the parties to whom information from the education records of a student is to be disclosed has been deleted. New section 99.30(c) states that the written consent must indicate "* * * the party or class of parties to whom the disclosure may be made."

Comment. Two commenters objected to the requirement that the consent to disclose information from the education records of a student must be a written consent.

Response. This is a statutory requirement. Section 438(b)(2)(A) specifies that information from the education records of a student may not be disclosed, except to particular parties or under particular circumstances, unless "* * * there is written consent from the student's parents. * * *" No change has been made in this requirement.

Comment. Several commenters indicated that it would be extremely difficult for an educational agency or institution to determine if a parent, particularly in the case of separated or divorced parents, has the authority to give consent for the disclosure of information from the education records of his or her child.

Response. New section 99.30(b) states that whenever written consent is required for the disclosure of information from the education records of a student, an educational agency or institution may presume that a parent of a student giving consent has the authority to do so, unless the agency or institution has been provided with evidence that the parent does not have the authority under applicable State law.

Comment. Several commenters indicated they felt that the requirement in section 99.33(c) of the proposed rules, which provided that when an institution was a guardian for a student an independent party must be appointed to consent to the disclosure of information from the education records of a student was inappropriate.

Response. The requirement that an independent party be appointed to consent to the disclosure of information from the education records of a student has been deleted. If an institution has been appointed the guardian of a student under applicable State law, the institution may exercise the rights provided to the parent of a student, unless it is precluded from doing so by another Federal or State statute.

Other Changes. New section 99.30 *When prior consent for disclosure required* incorporates material which appeared in sections 99.31 *Content of Consent* and 99.33 *Authority of parent to give consent.*

16. Section 99.31 *When prior consent for disclosure not required.*

Comment. Several commenters indicated they felt that there were additional individuals, institutions, agencies, or organizations to whom information from the education records of a student should be disclosed without the need for obtaining the written consent of a parent of a student or an eligible student.

Response. Section 438(b)(1)(A) through (I) specifies the individuals, institutions, agencies, or organizations to whom or circumstances under which information from the education records of a student may be disclosed without the written consent of a parent of a student or an eligible student. Since this is determined by statute no change has been made in the regulations.

Comment. Several commenters requested clarification regarding who would decide which school officials could obtain information from the education records of a student without the written consent of a parent of a student or an eligible student because the official had a "legitimate educational interest" in the receipt of the information.

Response. Section 438(b)(1)(A) specifies that an educational agency or institution may disclose information from the education records of a student without the written consent of a parent of a student or an eligible student to "* * * other school officials, including teachers within the educational institution or local educational agency who have been determined by such agency or institution to have legitimate educational interests; * * *." Section 99.5(a)(3) indicates that each educational agency or institution include as a part of the policies and procedures * * * a specification of the criteria for determining which parties are 'school officials' and what the educational agency or institution considers to be a 'legitimate educational interest', * * *."

Comment. Two commenters asked for clarification regarding to whom and for what purposes a disclosure of information from the education records of a student could be made in connection with financial aid without the written consent of a parent of a student or an eligible student.

Response. New section 99.31(a)(4) specifies that a disclosure of information from the education records of a student may be made without the written consent of a parent of a student or an eligible student if the disclosure is to a party which is the source of or administers the financial aid for which a student has applied, if the information is required to determine the eligibility of the student for the financial aid, or to enforce the terms of the financial aid award.

Comment. Several commenters asked for clarification regarding the exception which allows an institution of postsecondary education to disclose information from the education records of an eligible student to a parent if the eligible student is a dependent.

Response. Section 438(b)(1)(H) permits, but does not require, an educational agency or institution to disclose information from the education records of an eligible student to a parent if the eligible student is a dependent as defined in the Internal Revenue Code of 1954. If an educational agency or institution decides to adopt a policy of disclosing information from the education records of a dependent eligible student, the agency or institution will need to establish a procedure for determining whether or not the eligible student is a dependent as defined by the Internal Revenue Code. Some educational agencies or institutions may decide to ask an eligible student at the time of registration whether or not he or she is a dependent of his or her parents; other educational agencies or institutions may decide to require that a parent submit an affidavit stating that the eligible student is a dependent for income tax purposes. Nothing in section 438 of the Act or this part requires that a particular procedure be adopted for the purpose of establishing dependency.

Comment. Several commenters indicated that in many instances it would be difficult for an educational agency or institution to notify a parent of a student or an eligible student, particularly the parent of a former student or a former eligible student, of the receipt of a judicial order or subpoena in advance of the compliance therewith. Two commenters suggested that the requirement be that an educational agency or institution make a reasonable effort to provide the notification in advance of complying with the judicial order or subpoena.

Response. New section 99.31(a)(9) states that an educational agency or institution must make "* * * a reasonable effort to notify the parent of a student or the eligible student of the order or subpoena in advance of compliance therewith: * * *."

Comment. Several commenters asked for clarification as to whether an educational agency or institution was required to disclose information from the education records of a student in those cases where the information could be disclosed without the written consent of a parent of a student or an eligible student.

Response. New section 99.31(b) states that "This section shall not be construed to require or preclude disclosure of any personally identifiable information from the education records of a student by an educational agency or institution to the parties set forth in paragraph (a) of this section."

Other Changes. Section 99.31 *When prior consent for disclosure not required* incorporates material which appeared in Section 99.30 *Consent of the proposed rules.*

17. Section 99.32 *Record of disclosures required to be maintained.*

Comment. Several commenters objected to the requirement that an educational agency or institution maintain a record of parties who had requested, as well as those who had obtained, information from the education records of a student.

Response. Section 438(b)(4)(A) requires that an educational agency or institution

maintain a record, kept with the education records of each student, which will indicate all individuals, * * * agencies, or organizations which have requested or obtained access to a student's education records * * *.

The statute requires that a record be maintained of those parties who have "requested" information as well as those to whom information has been disclosed. No change has been made in the regulations.

Comment. A commenter asked for clarification regarding whether a record must be maintained of a disclosure of information to a parent of a student or an eligible student of information contained in the education records of the student.

Response. New section 99.32(a) (replacing proposed section 99.38) has been modified to make it clear that an educational agency or institution need not maintain a record of a disclosure of information to a parent of a student or an eligible student of information from the education records of the student.

Comment. Several commenters requested clarification as to whether or not an educational agency or institution is required to maintain a record of the disclosure of directory information.

Response. Section 99.32(a) makes it clear that an educational agency or institution is not required to maintain a record of the disclosures of directory information. Section 99.37 sets forth the requirements to be adhered to in the disclosure of directory information.

Comment. Two commenters asked for clarification regarding how long the record of disclosures of information contained in the education records of a student must be retained by an educational agency or institution.

Response. The record of disclosures of information contained in the education records of a student is considered to be a part of the education records of a student; therefore, the record of disclosures must be retained as long as the education records of a student to which they relate are maintained by an educational agency or institution.

Other Changes. Section 99.38 *Record of access* of the proposed rules has been renumbered and retitled section 99.32 *Record of disclosures required to be maintained.*

18. Section 99.33 *Limitations on redisclosure.*

Comment. A commenter asked for clarification as to whether information contained in the education records of a student which is disclosed to a centralized personnel bureau could be referred to various offices which might wish to consider a student for employment.

Response. Section 99.33(a) (proposed 99.39) makes it clear that when information contained in the education records of a student is disclosed to an institution, agency, or organization the information may be used by its officers, employees, and agents; but only for the purpose for which the disclosure was made.

Comment. A commenter asked for clarification regarding whether information disclosed from the education records of a student to a third party before the effective date of section 438 of the Act could be redisclosed without the written consent of a parent of a student or an eligible student.

Response. The statutory requirement that an educational agency or institution not release information to a third party except on the condition that the information not be redisclosed without the written consent of the parent or eligible student was not operative until the effective date of the Act. The condition cannot, therefore, be imposed with respect to information released prior to the effective date of the Act.

Comment. A commenter suggested that an educational agency or institution be required to obtain a written assurance from a third party that the party will not disclose any information from the education records of a student without the written consent of a parent of a student or an eligible student.

Response. Section 99.33(b) which provides a procedure to meet the requirement of section 438(b)(4)(B) requires that each educational agency or institution inform a third party to whom information from the education records of a student is disclosed that the third party may not disclose any information without the written consent of a parent of a student or an eligible student. However, nothing in section 438 of the Act or this part would preclude an educational agency or institution from adopting a policy of requiring a written assurance from a third party before disclosing information from the education records of a student.

Other Changes. Section 99.39 *Transfer of information by third parties* in the proposed rules has been renumbered and retitled section 99.33 *Limitations on redisclosure.*

19. Section 99.34 *Conditions for disclosure to officials of other schools and school systems.*

Comment. Several commenters indicated that it would be extremely difficult for an educational agency or institution to notify a parent of a student or an eligible student of the transfer of the education records of a student to another agency or institution, because usually the educational agency or institution did not have a new address for the parent or eligible student.

Response. New Section 99.34(a) requires that each educational agency or institution transferring the education records of a student make a reasonable effort to notify a parent of a student or an eligible student of the transfer of the records. Under the revised regulation, this requirement is met if the agency or institution includes a notice in its policies and procedures developed under Section 99.5 that it forwards education records to a school, on request,

in which the student seeks or intends to enroll. The requirement would also be met if a letter is sent to the last known address of the parent or eligible student. An educational agency or institution may transfer the records without waiting to receive an acknowledgement from the parent or eligible student that he or she has received the notification. The sending school is not required to further notify a parent or eligible student in those cases in which the transfer of the records is initiated by the parent or eligible student at the sending school.

20. Section 99.35 *Disclosure to certain Federal and State officials for Federal program purposes.*

Comment. A commenter asked for clarification regarding whether Federal officials, other than those Federal officials listed in Section 438(b)(3), could obtain information from the education records of a student without the written consent of a parent of a student or an eligible student.

Response. Section 438(b)(3) enumerates the purposes for which certain Federal and State officials who may obtain information from the education records of a student without the written consent of the parent of a student or an eligible student under Section 438 of the Act and this part. It does not represent an attempt at an exhaustive listing of all the specific authorized representatives of those officials who might have responsibility for performing the functions described in 438(b)(3).

Other changes. Section 99.37 *Release to Federal and State officials* of the proposed rules has been renumbered and retitled Section 99.35 *Disclosure to certain Federal and State officials for Federal program purposes.*

21. Section 99.36 *Conditions for disclosure in health and safety emergencies.*

Comment. Two commenters recommended that the regulations specify that the written consent of a parent of a student or an eligible student is not required for the disclosure of information from the education records of a student in a health or safety emergency.

Response. Section 99.31(a)(10) states that an educational agency or institution may disclose information from the education records of a student without the written consent of a parent of a student or an eligible student in a health or safety emergency, subject to the conditions set forth in section 99.36.

Comment. A commenter stated that the decision as to what constitutes a health or safety emergency should be left to the discretion of an official of an educational agency or institution.

Response. Section 99.36(a) states that an educational agency or institution may disclose information from the education records of a student in a health or safety emergency, but does not specify what constitutes a health or safety emergency. Each educational agency or institution must decide if there is a health or safety emergency which requires the disclosure of information from the education records of a student without the written consent of a parent of a student or an eligible student. Section 99.36(b) enumerates the criteria to be used by an educational agency or institution in making a decision as to whether or not to disclose the information without written consent.

Other Changes. Section 99.35 *Release of information for health or safety emergencies* of the proposed rules has been renumbered and retitled section 99.36 *Conditions for disclosure in health and safety emergencies.*

22. Section 99.37 *Conditions for disclosure of directory information.*

Comment. Three commenters requested clarification regarding what would satisfy the requirement that an educational agency or institution give public notice of the categories of information that it has designated as directory information. The commenter suggested that the regulations specify that in the case of an institution of postsecondary education a notice in the school catalog would satisfy the requirement.

Response. New section 99.37(b) states that an educational agency or institution shall "give public notice." The actual means to be used is to be determined by each educational agency or institution. An institution of postsecondary education could, for instance, publish the required notice and/or an article explaining it in the student newspaper, and make copies of the notice available at various department and school administrative offices.

Comment. A commenter suggested that each educational agency or institution be required to provide notification on an annual basis to parents of students or eligible students sixty days before the beginning of the school year as to the categories of personally identifiable information which the educational agency or institution has designated as directory information. If a parent of a student or an eligible student wanted to prohibit the disclosure of any category of information, he or she would be required to inform the educational agency or institution before or by the start of the school year.

Response. It was felt that it would be extremely difficult for an educational agency or institution to provide notification to parents of students or eligible students 60 days before the start of the school year. Many educational agencies and institutions, particularly institutions of elementary and secondary education, employ a limited number of individuals during the school vacation months. In addition, many educational agencies and institutions do not have an accurate list of students who will be in attendance at the agency or institution until the opening day of school or classes.

Comment. Several commenters indicated they felt that there should be restrictions on the disclosure of directory information by an educational agency or institution.

Response. An educational agency or institution which has followed the procedures set forth under section 99.37 may disclose directory information to any member of the public. Nothing in section 438 of the Act or this part would preclude an educational agency or institution adopting a more restrictive policy regarding the disclosure of directory information.

SUBPART E—ENFORCEMENT

23. *Assurances required—general.*

Comment. Two commenters suggested that each educational agency or institution be required to submit copies of the policies and procedures it has adopted in order to comply with section 438 of the Act and this part either in place of or in addition to the required assurance.

Response. Submission of copies of policies and procedures adopted by educational agencies or institutions is not considered to be an effective means of monitoring compliance with section 438 of the Act and this part, since it is an institution's practice which is of primary importance. However, the policies and procedures formulated and adopted by an educational agency or institution will be subject to review by the office established under section 99.60 as a part of its investigative function.

Comment. A commenter recommended that the requirement that each educational agency or institution submit an assurance that it is in compliance and will continue to comply with section 438 of the Act and this part be deleted because it has no statutory basis.

Response. The requirement that each educational agency or institution submit an assurance that it is in compliance has been deleted, primarily, to avoid additional paperwork burdens on the educational community. The assurance requirement for subgrants and subcontracts has, likewise, been deleted.

24. *Assurances—conflict with State or local law.*

Comment. Several commenters indicated they felt that the procedures for a waiver of the requirements of section 438 of the Act and this part set forth in sections 99.63(b) and (c) of the proposed rules were either unnecessary or inappropriate.

Response. Sections 99.63(b) and (c) of the proposed rules have been deleted. The section has been modified to provide that each educational agency or institution shall inform the office designated to administer the Act if a State or local law exists which conflicts with the requirements of section 438 of the Act and this part.

25. Section 99.62 *Reports and records.*

Comment. A commenter recommended that section 99.64 be revised to specify the types of records and reports which are to be maintained by each educational agency or institution.

Response. The intent of section 99.62 (proposed section 99.64) is to ensure that each educational agency or institution will provide records or reports which may be required by the office or review board to carry out their assigned functions. The nature of such reports and records must be determined on a case-by-case basis. No change has been made in the regulations.

26. Section 99.63 *Complaint procedures.*

Comment. Several commenters recommended that section 99.65(b) of the proposed rules which established a 180-day limitation for the filing of complaints be deleted because it was inappropriate.

Response. Section 99.65(b) has been deleted.

Comment. A commenter suggested that the complaint procedures specify the information which is to be contained in a complaint.

Response. It was felt that most complaints will contain the minimal information which is necessary to begin an investigation of a complaint of an alleged violation of section 438 of the Act or this part. It is the responsibility of the office, as a part of its investigative function, to obtain additional information from the concerned complainant and educational agency or institution. No change has been made in the regulations.

Effective date. These regulations shall be effective on June 17, 1976.

Dated: June 8, 1976.

DAVID MATHEWS,
Secretary of Health, Education, and Welfare.

Subpart A—General

Sec.
99.1 Applicability of part.
99.2 Purpose.
99.3 Definitions.
99.4 Student rights.
99.5 Formulation of institutional policy and procedures.
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99.7 Limitation on waivers.
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Subpart B—Inspection and Review of Education Records

99.11 Right to inspect and review education records.
99.12 Limitations on right to inspect and review education records at the postsecondary level.
99.13 Limitation on destruction of education records.

Subpart C—Amendment of Education Records

99.20 Request to amend education records.
99.21 Right to a hearing.
99.22 Conduct of the hearing.

Subpart D—Disclosure of Personally Identifiable Information From Education Records

99.30 Prior consent for disclosure required.
99.31 Prior consent for disclosure not required.
99.32 Record of disclosures required to be maintained.
99.33 Limitations on redisclosure.
99.34 Conditions for disclosure to officials of other schools or school systems.
99.35 Disclosure to certain Federal and State officials.
99.36 Conditions for disclosure in health or safety emergencies.
99.37 Conditions for disclosure of directory information.

Subpart E—Enforcement

99.60 Office and review board.
99.61 Conflict with State or local law.
99.62 Reports and records.
99.63 Complaint procedure.
99.64 Termination of funding.
99.65 Hearing procedures.
99.66 Hearing before Panel or a Hearing Officer.
99.67 Initial decision; final decision.

AUTHORITY: Sec. 438, Pub. L. 90-247, Title IV, as amended, 88 Stat. 571-574 (20 U.S.C. 1232g) unless otherwise noted.

Subpart A—General

§ 99.1 Applicability of part.

(a) This part applies to all educational agencies or institutions to which funds are made available under any Federal [program for which the U.S. Commissioner of Education has administrative responsibility, as specified by law or by delegation of authority pursuant to law.]

(20 U.S.C. 1230, 1232g)

(b) This part does not apply to an educational agency or institution solely because students attending that nonmonetary agency or institution receive benefits under one or more of the Federal programs referenced in paragraph (a) of this section, if no funds under those programs are made available to the agency or institution itself.

(c) For the purposes of this part, funds will be considered to have been made available to an agency or institution when funds under one or more of the programs referenced in paragraph (a) of this section: (1) Are provided to the agency or institution by grant, contract, subgrant, or subcontract, or (2) are provided to students attending the agency or institution and the funds may be paid to the agency or institution by those students for educational purposes, such as under the Basic Educational Opportunity Grants Program and the Guaranteed Student Loan Program (Titles IV-A-1 and IV-B, respectively, of the Higher Education Act of 1965, as amended).

(20 U.S.C. 1232g)

(d) Except as otherwise specifically provided, this part applies to education records of students who are or have been in attendance at the educational agency or institution which maintains the records.

(20 U.S.C. 1232g)

§ 99.2 Purpose.

The purpose of this part is to set forth requirements governing the protection of privacy of parents and students under section 438 of the General Education Provisions Act, as amended.

(20 U.S.C. 1232g)

§ 99.3 Definitions.

As used in this Part:

"Act" means the General Education Provisions Act, Title IV of Pub. L. 90-247, as amended.

"Attendance" at an agency or institution includes, but is not limited to: (a) attendance in person and by correspondence, and (b) the period during which a person is working under a work-study program.

"Commissioner" means the U.S. Commissioner of Education.

(20 U.S.C. 1232g)

"Directory information" includes the following information relating to a student: the student's name, address, telephone number, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, the most recent previous educational agency or institution attended by the student, and other similar information.

(20 U.S.C. 1232g(a)(5)(A))

"Disclosure" means permitting access or the release, transfer, or other communication of education records of the student or the personally identifiable information contained therein, orally or in writing, or by electronic means, or by any other means to any party.

[20 U.S.C. 1232g(b)(1)]

"Educational institution" or "educational agency or institution" means any public or private agency or institution which is the recipient of funds under any Federal program referenced in § 99.1(a). The term refers to the agency or institution recipient as a whole, including all of its components (such as schools or departments in a university) and shall not be read to refer to one or more of these components separate from that agency or institution.

(20 U.S.C. 1232g(a)(3))

"Education records" (a) means those records which: (1) Are directly related to a student, and (2) are maintained by an educational agency or institution or by a party acting for the agency or institution.

(b) The term does not include:

(1) Records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto which:

(i) Are in the sole possession of the maker thereof, and

(ii) Are not accessible or revealed to any other individual except a substitute. For the purpose of this definition, a "substitute" means an individual who performs on a temporary basis the duties of the individual who made the record, and does not refer to an individual who permanently succeeds the maker of the record in his or her position.

(2) Records of a law enforcement unit of an educational agency or institution which are:

(i) Maintained apart from the records described in paragraph (a) of this definition;

(ii) Maintained solely for law enforcement purposes, and

(iii) Not disclosed to individuals other than law enforcement officials of the same jurisdiction; *Provided*, That education records maintained by the educational agency or institution are not disclosed to the personnel of the law enforcement unit.

(3)(i) Records relating to an individual who is employed by an educational agency or institution which:

(A) Are made and maintained in the normal course of business;

(B) Relate exclusively to the individual in that individual's capacity as an employee, and

(C) Are not available for use for any other purpose.

(ii) This paragraph does not apply to records relating to an individual in attendance at the agency or institution who is employed as a result of his or her status as a student.

(4) Records relating to an eligible student which are:

(i) Created or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his or her professional or paraprofessional capacity, or assisting in that capacity;

(ii) Created, maintained, or used only in connection with the provision of treatment to the student, and

(iii) Not disclosed to anyone other than individuals providing the treatment; *Provided*, That the records can be personally reviewed by a physician or other appropriate professional of the student's choice. For the purpose of this definition, "treatment" does not include remedial educational activities or activities which are part of the program of instruction at the educational agency or institution.

(5) Records of an educational agency or institution which contain only information relating to a person after that person was no longer a student at the educational agency or institution. An example would be information collected by an educational agency or institution pertaining to the accomplishments of its alumni.

(20 U.S.C. 1232g(a)(4))

"Eligible student" means a student who has attained eighteen years of age, or is attending an institution of postsecondary education.

(20 U.S.C. 1232g(d))

"Financial Aid", as used in § 99.31(a)(4), means a payment of funds provided to an individual (or a payment in kind of tangible or intangible property to the individual) which is conditioned on the individual's attendance at an educational agency or institution.

(20 U.S.C. 1232g(b)(1)(D))

"Institution of postsecondary education" means an institution which provides education to students beyond the secondary school level; "secondary school level" means the educational level (not beyond grade 12) at which secondary education is provided, as determined under State law.

(20 U.S.C. 1232g(d))

"Panel" means the body which will adjudicate cases under procedures set forth in §§ 99.65–99.67.

"Parent" includes a parent, a guardian, or an individual acting as a parent of a student in the absence of a parent or guardian. An educational agency or institution may presume the parent has the authority to exercise the rights inherent in the Act unless the agency or institution has been provided with evidence that there is a State law or court order governing such matters as divorce, separation or custody, or a legally binding instrument which provides to the contrary.

"Party" means an individual, agency, institution or organization.

(20 U.S.C. 1232g(b)(4)(A))

"Personally identifiable" means that the data or information includes (a) the name of a student, the student's parent, or other family member, (b) the address of the student, (c) a personal identifier, such as the student's social security number or student number, (d) a list of personal characteristics which would make the student's identity easily traceable, or (e) other information which would make the student's identity easily traceable.

(20 U.S.C. 1232g)

"Record" means any information or data recorded in any medium, including, but not limited to: handwriting, print, tapes, film, microfilm, and microfiche.

(20 U.S.C. 1232g)

"Secretary" means the Secretary of the U.S. Department of Health, Education, and Welfare.

(20 U.S.C. 1232g)

"Student" (a) includes any individual with respect to whom an educational agency or institution maintains education records.

(b) The term does not include an individual who has not been in attendance at an educational agency or institution. A person who has applied for admission to, but has never been in attendance at a component unit of an institution of postsecondary education (such as the various colleges or schools which comprise a university), even if that individual is or has been in attendance at another component unit of that institution of postsecondary education, is not considered to be a student with respect to the component to which an application for admission has been made.

(20 U.S.C. 1232g(a)(5))

§ 99.4 Student rights.

(a) For the purposes of this part, whenever a student has attained eighteen years of age, or is attending an institution of postsecondary education, the rights accorded to and the consent required of the parent of the student shall thereafter only be accorded to and required of the eligible student.

(b) The status of an eligible student as a dependent of his or her parents for the purposes of § 99.31(a)(8) does not otherwise affect the rights accorded to and the consent required of the eligible student by paragraph (a) of this section.

(20 U.S.C. 1232g(d))

(c) Section 438 of the Act and the regulations in this part shall not be construed to preclude educational agencies or institutions from according to students rights in addition to those accorded to parents of students.

§ 99.5 Formulation of institutional policy and procedures.

(a) Each educational agency or institution shall, consistent with the minimum requirements of section 438 of the Act and this part, formulate and adopt a policy of—

(1) Informing parents of students or eligible students of their rights under § 99.6;

(2) Permitting parents of students or eligible students to inspect and review the education records of the student in accordance with § 99.11, including at least:

(i) A statement of the procedure to be followed by a parent or an eligible student who requests to inspect and review the education records of the student;

(ii) With an understanding that it may not deny access to an education record, a description of the circumstances in which the agency or institution feels it has a legitimate cause to deny a request for a copy of such records;

(iii) A schedule of fees for copies, and

(iv) A listing of the types and locations of education records maintained by the educational agency or institution and the titles and addresses of the officials responsible for those records;

(3) Not disclosing personally identifiable information from the education records of a student without the prior written consent of the parent of the student or the eligible student, except as otherwise permitted by §§ 99.31 and 99.37; the policy shall include, at least: (i) A statement of whether the educational agency or institution will disclose personally identifiable information from the education records of a student under § 99.31(a)(1) and, if so, a specification of the criteria for determining which parties are "school officials" and what the educational agency or institution considers to be a "legitimate educational interest", and (ii) a specification of the personally identifiable information to be designated as directory information under § 99.37;

(4) Maintaining the record of disclosures of personally identifiable information from the education records of a student required to be maintained by § 99.32, and permitting a parent or an eligible student to inspect that record;

(5) Providing a parent of the student or an eligible student with an opportunity to seek the correction of education records of the student through a request to amend the records or a hearing under Subpart C, and permitting the parent of a student or an eligible student to place a statement in the education records of the student as provided in § 99.21(c);

(b) The policy required to be adopted by paragraph (a) of this section shall be in writing and copies shall be made available upon request to parents of students and to eligible students.

[20 U.S.C. 1232g (e) and (f)]

§ 99.6 Annual notification of rights.

(a) Each educational agency or institution shall give parents of students in attendance or eligible students in attendance at the agency or institution

annual notice by such means as are reasonably likely to inform them of the following:

(1) Their rights under section 438 of the Act, the regulations in this part, and the policy adopted under § 99.5; the notice shall also inform parents of students or eligible students of the locations where copies of the policy may be obtained; and

(2) The right to file complaints under § 99.63 concerning alleged failures by the educational agency or institution to comply with the requirements of section 438 of the Act and this part.

(b) Agencies and institutions of elementary and secondary education shall provide for the need to effectively notify parents of students identified as having a primary or home language other than English.

[20 U.S.C. 1232g(e)]

§ 99.7 Limitations on waivers.

(a) Subject to the limitations in this section and § 99.12, a parent of a student or a student may waive any of his or her rights under section 438 of the Act or this part. A waiver shall not be valid unless in writing and signed by the parent or student, as appropriate.

(b) An educational agency or institution may not require that a parent of a student or student waive his or her rights under section 438 of the Act or this part. This paragraph does not preclude an educational agency or institution from requesting such a waiver.

(c) An individual who is an applicant for admission to an institution of postsecondary education or is a student in attendance at an institution of postsecondary education may waive his or her right to inspect and review confidential letters and confidential statements of recommendation described in § 99.12(a) (3) except that the waiver may apply to confidential letters and statements only if: (1) The applicant or student is, upon request, notified of the names of all individuals providing the letters or statements; (2) the letters or statements are used only for the purpose for which they were originally intended, and (3) such waiver is not required by the agency or institution as a condition of admission to or receipt of any other service or benefit from the agency or institution.

(d) All waivers under paragraph (c) of this section must be executed by the individual, regardless of age, rather than by the parent of the individual.

(e) A waiver under this section may be made with respect to specified classes of: (1) Education records, and (2) persons or institutions.

(f)(1) A waiver under this section may be revoked with respect to any actions occurring after the revocation.

(2) A revocation under this paragraph must be in writing.

(3) If a parent of a student executes a waiver under this section, that waiver may be revoked by the student at any time after he or she becomes an eligible student.

[20 U.S.C. 1232g(a)(1) (B) and (C)]

§ 99.8 Fees.

(a) An educational agency or institution may charge a fee for copies of education records which are made for the parents of students, students, and eligible students under section 438 of the Act and this part; *Provided*, That the fee does not effectively prevent the parents and students from exercising their right to inspect and review those records.

(b) An educational agency or institution may not charge a fee to search for or to retrieve the education records of a student.

[20 U.S.C. 1232g(a)(1)]

Subpart B—Inspection and Review of Education Records

§ 99.11 Right to inspect and review education records.

(a) Each educational agency or institution, except as may be provided by § 99.12, shall permit the parent of a student or an eligible student who is or has been in attendance at the agency or institution, to inspect and review the education records of the student. The agency or institution shall comply with a request within a reasonable period of time, but in no case more than 45 days after the request has been made.

(b) The right to inspect and review education records under paragraph (a) of this section includes:

(1) The right to a response from the educational agency or institution to reasonable requests for explanations and interpretations of the records; and

(2) The right to obtain copies of the records from the educational agency or institution where failure of the agency or institution to provide the copies would effectively prevent a parent or eligible student from exercising the right to inspect and review the education records.

(c) An educational agency or institution may presume that either parent of the student has authority to inspect and review the education records of the student unless the agency or institution has been provided with evidence that there is a legally binding instrument, or a State law or court order governing such matters as divorce, separation or custody, which provides to the contrary.

§ 99.12 Limitations on right to inspect and review education records at the postsecondary level.

(a) An institution of postsecondary education is not required by section 438 of the Act or this part to permit a student to inspect and review the following records:

(1) Financial records and statements of their parents or any information contained therein;

(2) Confidential letters and confidential statements of recommendation which were placed in the education records of a student prior to January 1, 1975; *Provided*, That:

(i) The letters and statements were solicited with a written assurance of confidentiality, or sent and retained with a documented understanding of confidentiality, and

(ii) The letters and statements are used only for the purposes for which they were specifically intended;

(3) Confidential letters of recommendation and confidential statements of recommendation which were placed in the education records of the student after January 1, 1975:

(i) Respecting admission to an educational institution;

(ii) Respecting an application for employment, or

(iii) Respecting the receipt of an honor or honorary recognition; *Provided*, That the student has waived his or her right to inspect and review those letters and statements of recommendation under § 99.7(c).

(20 U.S.C. 1232g(a)(1)(B))

(b) If the education records of a student contain information on more than one student, the parent of the student or the eligible student may inspect and review or be informed of only the specific information which pertains to that student.

(20 U.S.C. 1232g(a)(1)(A))

§ 99.13 Limitations on destruction of education records.

An educational agency or institution is not precluded by section 438 of the Act or this part from destroying education records, subject to the following exceptions:

(a) The agency or institution may not destroy any education records if there is an outstanding request to inspect and review them under § 99.11;

(b) Explanations placed in the education record under § 99.21 shall be maintained as provided in § 99.21(d), and

(c) The record of access required under § 99.32 shall be maintained for as long as the education record to which it pertains is maintained.

(20 U.S.C. 1232g(f))

Subpart C—Amendment of Education Records

§ 99.20 Request to amend education records.

(a) The parent of a student or an eligible student who believes that information contained in the education records of the student is inaccurate or misleading or violates the privacy or other rights of the student may request that the educational agency or institution which maintains the records amend them.

(b) The educational agency or institution shall decide whether to amend the education records of the student in accordance with the request within a reasonable period of time of receipt of the request.

(c) If the educational agency or institution decides to refuse to amend the education records of the student in accordance with the request it shall so inform the parent of the student or the eligible student of the refusal, and advise the parent or the eligible student of the right to a hearing under § 99.21.

[20 U.S.C. 1232g(a)(2)]

§ 99.21 Right to a hearing.

(a) An educational agency or institution shall, on request, provide an opportunity for a hearing in order to challenge the content of a student's education records to insure that information in the education records of the student is not inaccurate, misleading or otherwise in violation of the privacy or other rights of students. The hearing shall be conducted in accordance with § 99.22.

(b) If, as a result of the hearing, the educational agency or institution decides that the information is inaccurate, misleading or otherwise in violation of the privacy or other rights of students, it shall amend the education records of the student accordingly and so inform the parent of the student or the eligible student in writing.

(c) If, as a result of the hearing, the educational agency or institution decides that the information is not inaccurate, misleading or otherwise in violation of the privacy or other rights of students, it shall inform the parent or eligible student of the right to place in the education records of the student a statement commenting upon the information in the education records and/or setting forth any reasons for disagreeing with the decision of the agency or institution.

(d) Any explanation placed in the education records of the student under paragraph (c) of this section shall:

(1) Be maintained by the educational agency or institution as part of the education records of the student as long as the record or contested portion thereof is maintained by the agency or institution, and

(2) If the education records of the student or the contested portion thereof is disclosed by the educational agency or institution to any party, the explanation shall also be disclosed to that party.

[20 U.S.C. 1232g(a)(2)]

§ 99.22 Conduct of the hearing.

The hearing required to be held by § 99.21(a) shall be conducted according to procedures which shall include at least the following elements:

(a) The hearing shall be held within a reasonable period of time after the educational agency or institution has received the request, and the parent of the student or the eligible student shall be given notice of the date, place and time reasonably in advance of the hearing;

(b) The hearing may be conducted by any party, including an official of the educational agency or institution, who does not have a direct interest in the outcome of the hearing;

(c) The parent of the student or the eligible student shall be afforded a full and fair opportunity to present evidence relevant to the issues raised under § 99.21, and may be assisted or represented by individuals of his or her choice at his or her own expense, including an attorney;

(d) The educational agency or institution shall make its decision in writing within a reasonable period of time after the conclusion of the hearing; and

(e) The decision of the agency or institution shall be based solely upon the evidence presented at the hearing and shall include a summary of the evidence and the reasons for the decision.

[20 U.S.C. 1232g(a)(2)]

Subpart D—Disclosure of Personally Identifiable Information From Education Records

§ 99.30 Prior consent for disclosure required.

(a)(1) An educational agency or institution shall obtain the written consent of the parent of a student or the eligible student before disclosing personally identifiable information from the education records of a student, other than directory information, except as provided in § 99.31.

(2) Consent is not required under this section where the disclosure is to (i) the parent of a student who is not an eligible student, or (ii) the student himself or herself.

(b) Whenever written consent is required, an educational agency or institution may presume that the parent of the student or the eligible student giving consent has the authority to do so unless the agency or institution has been provided with evidence that there is a legally binding instrument, or a State law or court order governing such matters as divorce, separation or custody, which provides to the contrary.

(c) The written consent required by paragraph (a) of this section must be signed and dated by the parent of the student or the eligible student giving the consent and shall include:

(1) A specification of the records to be disclosed,

(2) The purpose or purposes of the disclosure, and

(3) The party or class of parties to whom the disclosure may be made.

(d) When a disclosure is made pursuant to paragraph (a) of this section, the educational agency or institution shall, upon request, provide a copy of the record which is disclosed to the parent of the student or the eligible student, and to the student who is not an eligible student if so requested by the student's parents.

[20 U.S.C. 1232g(b)(1) and (b)(2)(A)]

§ 99.31 Prior consent for disclosure not required.

(a) An educational agency or institution may disclose personally identifiable information from the education records of a student without the written consent of the parent of the student or the eligible student if the disclosure is—

(1) To other school officials, including teachers, within the educational institution or local educational agency who have been determined by the agency or institution to have legitimate educational interests;

(2) To officials of another school or school system in which the student seeks or intends to enroll, subject to the requirements set forth in § 99.34;

(3) Subject to the conditions set forth in § 99.35, to authorized representatives of:

(i) The Comptroller General of the United States,

(ii) The Secretary,

(iii) The Commissioner, the Director of the National Institute of Education, or the Assistant Secretary for Education, or

(iv) State educational authorities;

(4) In connection with financial aid for which a student has applied or which a student has received; *Provided*, That personally identifiable information from the education records of the student may be disclosed only as may be necessary for such purposes as:

(i) To determine the eligibility of the student for financial aid,

(ii) To determine the amount of the financial aid,

(iii) To determine the conditions which will be imposed regarding the financial aid, or

(iv) To enforce the terms or conditions of the financial aid;

(5) To State and local officials or authorities to whom information is specifically required to be reported or disclosed pursuant to State statute adopted prior to November 19, 1974. This subparagraph applies only to statutes which require that specific information be disclosed to State or local officials and does not apply to statutes which permit but do not require disclosure. Nothing in this paragraph shall prevent a State from further limiting the number or type of State or local officials to whom disclosures are made under this subparagraph;

(6) To organizations conducting studies for, or on behalf of, educational agencies or institutions for the purpose of developing, validating, or administering predictive tests, administering student aid programs, and improving instruction; *Provided*, That the studies are conducted in a manner which will not permit the personal identification of students and their parents by individuals other than representatives of the organization and the information will be destroyed when no longer needed for the purposes for which the study was conducted; the term "organizations" includes, but is not limited to, Federal, State and local agencies, and independent organizations;

(7) To accrediting organizations in order to carry out their accrediting functions;

(8) To parents of a dependent student, as defined in section 152 of the Internal Revenue Code of 1954;

(9) To comply with a judicial order or lawfully issued subpoena; *Provided*, That the educational agency or institution makes a reasonable effort to notify the parent of the student or the eligible student of the order or subpoena in advance of compliance therewith; and

(10) To appropriate parties in a health or safety emergency subject to the conditions set forth in § 99.36.

(b) This section shall not be construed to require or preclude disclosure of any personally identifiable information from the education records of a student by an educational agency or institution to the parties set forth in paragraph (a) of this section.

[20 U.S.C. 1232g(b)(1)]

§ 99.32 Record of disclosures required to be maintained.

(a) An educational agency or institution shall for each request for and each disclosure of personally identifiable information from the education records of a student, maintain a record kept with the education records of the student which indicates:

(1) The parties who have requested or obtained personally identifiable information from the education records of the student, and

(2) The legitimate interests these parties had in requesting or obtaining the information.

(b) Paragraph (a) of this section does not apply to disclosures to a parent of a student or an eligible student, disclosures pursuant to the written consent of a parent of a student or an eligible student when the consent is specific with respect to the party or parties to whom the disclosure is to be made, disclosures to school officials under § 99.31(a)(1), or to disclosures of directory information under § 99.37.

(c) The record of disclosures may be inspected:

(1) By the parent of the student or the eligible student,

(2) By the school official and his or her assistants who are responsible for the custody of the records, and

(3) For the purpose of auditing the recordkeeping procedures of the educational agency or institution by the parties authorized in, and under the conditions set forth in § 99.31(a)(1) and (3).

(20 U.S.C. 1232g(b)(2)(A))

§ 99.33 Limitation on redisclosure.

(a) An educational agency or institution may disclose personally identifiable information from the education records of a student only on the condition that the party to whom the information is disclosed will not disclose the information to any other party without the prior written consent of the parent of the student or the eligible student, except that the personally identifiable information which is disclosed to an institution, agency or organization may be used by its officers, employees and agents, but only for the purposes for which the disclosure was made.

(b) Paragraph (a) of this section does not preclude an agency or institution from disclosing personally identifiable information under § 99.31 with the understanding that the information will be redisclosed to other parties under that section; *Provided*, That the recordkeeping requirements of § 99.32 are met with respect to each of those parties.

(c) An educational agency or institution shall, except for the disclosure of directory information under § 99.37, inform the party to whom a disclosure is made of the requirement set forth in paragraph (a) of this section.

[20 U.S.C. 1232g(b)(4)(B)]

§ 99.34 Conditions for disclosure to officials of other schools and school systems.

(a) An educational agency or institution transferring the education records of a student pursuant to § 99.31(a)(2) shall:

(1) Make a reasonable attempt to notify the parent of the student or the eligible student of the transfer of the records at the last known address of the parent or eligible student, except:

(i) When the transfer of the records is initiated by the parent or eligible student at the sending agency or institution, or

(ii) When the agency or institution includes a notice in its policies and procedures formulated under § 99.5 that it forwards education records on request to a school in which a student seeks or intends to enroll; the agency or institution does not have to provide any further notice of the transfer;

(2) Provide the parent of the student or the eligible student, upon request, with a copy of the education records which have been transferred; and

(3) Provide the parent of the student or the eligible student, upon request, with an opportunity for a hearing under Subpart C of this part.

(b) If a student is enrolled in more than one school, or receives services from more than one school, the schools may disclose information from the education records of the student to each other without obtaining the written consent of the parent of the student or the eligible student; *Provided*, That the disclosure meets the requirements of paragraph (a) of this section.

[20 U.S.C. 1232g(b)(1)(B)]

§ 99.35 Disclosure to certain Federal and State officials for Federal program purposes.

(a) Nothing in section 438 of the Act or this part shall preclude authorized representatives of officials listed in § 99.31(a)(3) from having access to student and other records which may be necessary in connection with the audit and evaluation of Federally supported education programs, or in connection with the enforcement of or compliance with the Federal legal requirements which relate to these programs.

(b) Except when the consent of the parent of a student or an eligible student has been obtained under § 99.30, or when the collection of personally identifiable information is specifically authorized by Federal law, any data collected by officials listed in § 99.31(a)(3) shall be protected in a manner which will not permit the personal identification of students and their parents by other than those officials, and personally identifiable data shall be destroyed when no longer needed for such audit, evaluation, or enforcement of or compliance with Federal legal requirements.

[20 U.S.C. 1232g(b)(3)]

§ 99.36 Conditions for disclosure in health and safety emergencies.

(a) An educational agency or institution may disclose personally identifiable information from the education records of a student to appropriate parties in connection with an emergency if knowledge of the information is necessary to protect the health or safety of the student or other individuals.

(b) The factors to be taken into account in determining whether personally identifiable information from the education records of a student may be disclosed under this section shall include the following:

(1) The seriousness of the threat to the health or safety of the student or other individuals;

(2) The need for the information to meet the emergency;

(3) Whether the parties to whom the information is disclosed are in a position to deal with the emergency; and

(4) The extent to which time is of the essence in dealing with the emergency.

(c) Paragraph (a) of this section shall be strictly construed.

[20 U.S.C. 1232g(b)(1)(I)]

§ 99.37 Conditions for disclosure of directory information.

(a) An educational agency or institution may disclose personally identifiable information from the education records of a student who is in attendance at the institution or agency if that information has been designated as directory information (as defined in § 99.3) under paragraph (c) of this section.

(b) An educational agency or institution may disclose directory information from the education records of an individual who is no longer in attendance at the agency or institution without following the procedures under paragraph (c) of this section.

(c) An educational agency or institution which wishes to designate directory information shall give public notice of the following:

(1) The categories of personally identifiable information which the institution has designated as directory information;

(2) The right of the parent of the student or the eligible student to refuse to permit the designation of any or all of the categories of personally identifiable information with respect to that student as directory information; and

(3) The period of time within which the parent of the student or the eligible student must inform the agency or institution in writing that such personally identifiable information is not to be designated as directory information with respect to that student.

[20 U.S.C. 1232g(a)(5)(A) and (B)]

Subpart E—Enforcement

§ 99.60 Office and review board.

(a) The Secretary is required to establish or designate an office and a review board under section 438(g) of the Act. The office will investigate, process, and review violations, and complaints which may be filed concerning alleged violations of the provisions of section 438 of the Act and the regulations in this part. The review board will adjudicate cases referred to it by the office under the procedures set forth in §§ 99.65–99.67.

(b) The following is the address of the office which has been designated under paragraph (a) of this section: The Family Educational Rights and Privacy Act Office (FERPA), Department of Health, Education, and Welfare, 330 Independence Ave. SW., Washington, D.C. 20201.

(20 U.S.C. 1232g(g))

§ 99.61 Conflict with State or local law.

An educational agency or institution which determines that it cannot comply with the requirements of section 438 of the Act or of this part because a State or local law conflicts with the provisions of section 438 of the Act or the regulations in this part shall so advise the office designated under § 99.60(b) within 45 days of any such determination, giving the text and legal citation of the conflicting law.

(20 U.S.C. 1232g(f))

§ 99.62 Reports and records.

Each educational agency or institution shall (a) submit reports in the form and containing such information as the Office of the Review Board may require to carry out their functions under this part, and (b) keep the records and afford access thereto as the Office or the Review Board may find necessary to assure the correctness of those reports and compliance with the provisions of sections 438 of the Act and this part.

(20 U.S.C. 1232g(f) and (g))

§ 99.63 Complaint procedure.

(a) Complaints regarding violations of rights accorded parents and eligible students by section 438 of the Act or the regulations in this part shall be submitted to the Office in writing.

(b)(1) The Office will notify each complainant and the educational agency or institution against which the violation has been alleged, in writing, that the complaint has been received.

(2) The notification to the agency or institution under paragraph (b)(1) of this section shall include the substance of the alleged violation and the agency or institution shall be given an opportunity to submit a written response.

(c)(1) The Office will investigate all timely complaints received to determine whether there has been a failure to comply with the provisions of section 438 of the Act or the regulations in this part, and may permit further written or oral submissions by both parties.

(2) Following its investigation the Office will provide written notification of its findings and the basis for such findings, to the complainant and the agency or institution involved.

(3) If the Office finds that there has been a failure to comply, it will include in its notification under paragraph (c)(2) of this section, the specific steps which must be taken by the agency or educational institution to bring the agency or institution into compliance. The notification shall also set forth a reasonable period of time, given all of the circumstances of the case, for the agency or institution to voluntarily comply.

(d) If the educational agency or institution does not come into compliance within the period of time set under paragraph (c)(3) of this section, the matter will be referred to the Review Board for a hearing under §§ 99.64–99.67, inclusive.

(20 U.S.C. 1232g(f))

§ 99.64 Termination of funding.

If the Secretary, after reasonable notice and opportunity for a hearing by the Review Board, (1) finds that an educational agency or institution has failed to comply with the provisions of section 438 of the Act, or the regulations in this part, and (2) determines that compliance cannot be secured by voluntary means, he shall issue a decision, in writing, that no funds under any of the Federal programs referenced in § 99.1(a) shall be made available to that educational agency or institution (or, at the Secretary's discretion, to the unit of the educational agency or institution affected by the failure to comply) until there is no longer any such failure to comply.

(20 U.S.C. 1232g(f))

§ 99.65 Hearing procedures.

(a) *Panels.* The Chairman of the Review Board shall designate Hearing Panels to conduct one or more hearings under § 99.64. Each Panel shall consist of not less than three members of the Review Board. The Review Board may, at its discretion, sit for any hearing or class of hearings. The Chairman of the Review Board shall designate himself or any other member of a Panel to serve as Chairman.

(b) *Procedural rules.* (1) With respect to hearings involving, in the opinion of the Panel, no dispute as to a material fact the resolution of which would be materially assisted by oral testimony, the Panel shall take appropriate steps to afford to each party to the proceeding an opportunity for presenting his case at the option of the Panel (i) in whole or in part in writing or (ii) in an informal conference before the Panel which shall afford each party: (A) Sufficient notice of the issues to be considered (where such notice has not previously been afforded); and (B) an opportunity to be represented by counsel.

(2) With respect to hearings involving a dispute as to a material fact the resolution of which would be materially assisted by oral testimony, the Panel shall afford each party an opportunity, which shall include, in addition to provisions required by subparagraph (1)(ii) of this paragraph, provisions designed to assure to each party the following:

(i) An opportunity for a record of the proceedings;

(ii) An opportunity to present witnesses on the party's behalf; and

(iii) An opportunity to cross-examine other witnesses either orally or through written interrogatories.

(20 U.S.C. 1232g(g))

§ 99.66 Hearing before Panel or a Hearing Officer.

A hearing pursuant to § 99.65(b)(2) shall be conducted, as determined by the Panel Chairman, either before the Panel or a hearing officer. The hearing officer may be (a) one of the members of the Panel or (b) a nonmember who is appointed as a hearing examiner under 5 U.S.C. 3105.

(20 U.S.C. 1232g(g))

§ 99.67 Initial decision; final decision.

(a) The Panel shall prepare an initial written decision, which shall include findings of fact and conclusions based thereon. When a hearing is conducted before a hearing officer alone, the hearing officer shall separately find and state the facts and conclusions which shall be incorporated in the initial decision prepared by the Panel.

(b) Copies of the initial decision shall be mailed promptly by the Panel to each party (or to the party's counsel), and to the Secretary with a notice affording the party an opportunity to submit written comments thereon to the Secretary within a specified reasonable time.

(c) The initial decision of the Panel transmitted to the Secretary shall become the final decision of the Secretary, unless, within 25 days after the expiration of the time for receipt of written comments, the Secretary advises the Review Board in writing of his determination to review the decision.

(d) In any case in which the Secretary modifies or reverses the initial decision of the Panel, he shall accompany that action with a written statement of the grounds for the modification or reversal, which shall promptly be filed with the Review Board.

(e) Review of any initial decision by the Secretary shall be based upon the decision, the written record, if any, of the Panel's proceedings, and written comments or oral arguments by the parties, or by their counsel, to the proceedings.

(f) No decision under this section shall become final until it is served upon the educational agency or institution involved or its attorney.

(20 U.S.C. 1232g(g))

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